> disadvantaged individuals for purposes of this subsection.

105 Stat. 1919-1920. Section 8(d) of the Small Business Act and the DOT regulations establish a rebuttable presumption that members of certain racial or ethnic groups are socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C); 49 C.F.R. Pt. 23, Subpt. D, App. C. Those groups are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, and any other racial minority group or individual that the Small Business Administration has previously found to be disadvantaged pursuant to Section 8(a) of the Small Business Act. 49 C.F.R. 23.62; see also 13 C.F.R. 124.105(b).[2]

Under the applicable DOT regulations, the presumption that women and members of the specified racial and ethnic groups are socially and economically disadvantaged is rebuttable and is subject to challenge by third parties. 49 C.F.R. 23.69. Firms owned by persons presumed to be disadvantaged may be decertified or not certified at the outset if the recipient of federal funds determines that the individual owners are not in fact socially and economically disadvantaged. See 49 C.F.R. Pt. 23, Subpt. D, App. A.

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[2] Section 8(a)(5) of the Small Business Act provides that a "socially disadvantaged individual" is a person who has been subjected to "racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. 637(a)(5). Section 8(a)(6)(A) of the Act states that "[e]conomically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A).

Both minority and nonminority firms are eligible for DBE certification. The Small Business Act contains a congressional finding that social and economic disadvantage is "not limited to" the racial and ethnic groups specified in the statute and regulations. 15 U.S.C. 631(f)(1)(C). Individuals who are not members of the designated minority groups will not be presumed to suffer from social and economic disadvantage, but they may establish such disadvantage by satisfying criteria set forth in the DOT regulations. See 49 C.F.R. Pt. 23, Subpt. D, App. A. As the regulations explain, persons such as

> disabled Vietnam veterans, Appalachian white males, Hasidic Jews, or any other individuals who are able to demonstrate * * * that they are socially and economically disadvantaged may be treated as eligible to own and control a disadvantaged business, on the same basis as a member of one of the presumptive groups.

Ibid.

In order to demonstrate social disadvantage on an individualized basis, "[t]he individual's social disadvantage must stem from his or her color; national origin; gender; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause beyond the individual's control." 49 C.F.R. Pt. 23, Subpt. D, App. C. Criteria for determining social disadvantage include assessments of an individual's education, employment experiences, and business history. *Ibid.* An individual may establish economic disadvantage by demonstrating that his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same

or similar line of business and competitive market area who are not socially disadvantaged." *Ibid.*

4. Petitioner is a licensed electrical contractor and bids on federally-funded construction contracts in Utah. It is not a "small" business because its annual gross revenues of approximately $41 million exceed the maximum allowed by statute and by DOT's implementing regulations. Pet. App. 4, 20; Pet. 8. Petitioner's owners are not members of any of the groups that are presumed to be disadvantaged under ISTEA and the accompanying regulations. Pet. App. 4, 20.

In 1995, petitioner submitted bids to the prime contractors for the electrical work to be done on two federally-funded projects. Petitioner submitted the lowest bid for each project. On each occasion, however, the prime contractor that was awarded the contract by UDOT awarded the electrical subcontract to a DBE that submitted the next lowest bid. Each of the prime contractors stated that it would have awarded the subcontract to petitioner if the DBE provisions had not been in place. Pet. App. 4-5.

5. Petitioner filed suit against UDOT, alleging that UDOT's DBE program discriminates on the basis of race and gender in violation of the Equal Protection Clauses of the Fifth and Fourteenth Amendments. The United States Department of Transportation intervened as a defendant.

On cross-motions for summary judgment, the district court dismissed petitioner's suit for lack of jurisdiction. Pet. App. 16-27. The court held that petitioner lacked standing to sue because it had failed to demonstrate that its alleged injury was caused by the challenged statutory and regulatory provisions, and that a favorable decision regarding the constitutionality of those provisions would redress petitioner's alleged harms.

Id. at 22-26. The court explained that a business would have standing to challenge the provisions defining social and economic advantage only if it could "show that it is otherwise qualified to participate in the program and is prevented from doing so by the challenged discriminatory policies." *Id.* at 23. It concluded that petitioner could not make that showing because its gross receipts were too great to permit it to qualify as a "small" business. *Id.* at 22-23, 26.

Petitioner contended that it would benefit from invalidation of the race- and gender-based presumptions despite the fact that its size independently precluded it from participating in the DBE program. Petitioner argued that invalidation of those presumptions would cause fewer businesses to qualify for the DBE program, thereby forcing contractors and the UDOT to request waivers from the federal requirements and increasing competitive opportunities for petitioner. Pet. App. 23. The district court found that postulated chain of events to be "too speculative to support the direct causal link necessary to support [petitioner's] standing." *Id.* at 24.

6. The court of appeals affirmed. Pet. App. 1-13. The court stated that petitioner was injured by the DBE provisions taken as a whole because it was prevented from competing on an equal basis with businesses classified as DBEs. *Id.* at 6-7. It held, however, that petitioner lacked standing to challenge ISTEA's race- and gender-based presumptions because a judicial decision invalidating those presumptions would not redress petitioner's injury. *Id.* at 7-13.[3]

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[3] The court of appeals noted that "[t]raditionally, redressability and traceability overlap as two sides of a causation coin," Pet. App. 7 (quoting *Dynalantic Corp.* v. *Department of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997)), and it assumed "for the sake of

The court of appeals first explained that the challenged presumptions are severable from the remainder of the statute. Pet. App. 9-11. It observed that an allegedly unconstitutional statutory provision will ordinarily be treated as severable unless it is evident that Congress would not have enacted the remainder of the law absent the challenged provision. *Id.* at 9 (citing *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987)). The court stated that "the basic intent of [ISTEA] is to foster growth in small businesses owned by 'socially and economically disadvantaged people.'" Pet. App. 9. The court emphasized that a small business entity may qualify as "socially and economically disadvantaged" *either* "by relying on the race- or gender-based presumption of such disadvantage" *or* "by satisfying the race- and gender-neutral criteria established in the statute and amplified in the regulations." *Ibid.* Based on "the statutory race- and gender-neutral methods of establishing social and economic disadvantage," the court of appeals found it "clear that the legislative intent to foster development in small businesses whose owners have had to overcome social and economic hardship would remain even in the absence of the challenged presumption." *Id.* at 10. The court found that conclusion to be buttressed by the legislative history of the Small Business Act and ISTEA. *Id.* at 10-11.

The court of appeals acknowledged that petitioner might be able to establish standing despite the severability of the challenged race- and gender-based presumptions if it could show "that the practical effect

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argument that [petitioner] has established that its injury is 'fairly traceable' to the DBE program and its race and gender preferences," *id.* at 8.

of eliminating the presumption would be some meaningful reduction in the number of DBEs against which it would be forced to compete." Pet. App. 12. The court cautioned, however, that "at summary judgment, it is a plaintiff's burden to adduce evidence sufficient to establish necessary jurisdictional facts," and that petitioner "may not establish standing by merely hypothesizing that elimination of the presumption would improve its terms of competition." *Ibid.* The court concluded that petitioner had failed to satisfy its burden because "the record before [the court] includes no evidence that any DBEs would be disqualified as a result of eliminating the presumption." *Ibid.*[4]

ARGUMENT

The court of appeals' decision in this case is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to

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[4] The court explained:

> [T]he record does contain a list of businesses that UDOT has certified as DBEs. The record, however, is silent on whether those subcontractors relied on the disputed presumption, the race- and gender-neutral criteria, or both to receive such certification. In fact, there is no evidence that any other subcontractors against whom [petitioner] competes would lose their DBE status as a result of eliminating the presumption. [Petitioner] has therefore made no showing that an improvement in its terms of competition for subsequent contracts would likely result from a substantive adjudication in its favor.

Pet. App. 13.

identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). To satisfy the requirements of Article III, "a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). Article III thus requires a plaintiff to demonstrate that he "stand[s] to profit in some personal interest" by a judgment in his favor, *Allen* v. *Wright*, 468 U.S. 737, 766 (1984) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976)), thereby ensuring that the federal courts resolve disputed legal questions "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy," *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)). This Court's "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

2. Petitioner contends that UDOT's use of the race- and gender-based presumptions of social and economic disadvantage mandated by ISTEA is unconstitutional. Pet. App. 1-2. Even if those presumptions were held to be unlawful, however, petitioner would be ineligible to participate in the DBE program because its annual gross revenues of approximately $41 million exceed the maximum allowed by ISTEA and DOT's implementing

regulations. *Id.* at 4; Pet. 8.[5] The district court was therefore correct in holding that any injury petitioner may suffer as a result of the DBE program "is fairly traceable only to that aspect of the program that limits participation based on [petitioner's] financial status." Pet. App. 22.

The existence of an independent (and unquestionably constitutional) barrier to petitioner's participation in the DBE program distinguishes this case from the decisions on which petitioner relies. The plaintiff in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), was a "small business" within the meaning of the relevant statutory and regulatory provisions. See No. 93-1841 (*Adarand*) Tr. Oral Arg. 3 (counsel for Adarand states that "[i]n the year surrounding the events that led to this action, Adarand's annual average gross receipts were approximately $900,000"). The same was true of the plaintiff in *Dynalantic Corp.* v. *Department of Defense*, 115 F.3d 1012 (D.C. Cir. 1997). See *Dynalantic Corp.* v. *United States Dep't of Defense*, 937 F. Supp. 1, 2 (D.D.C. 1996).[6] In *Northeastern Florida*

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[5] The DOT regulations state that "[b]efore making any determination of social and economic disadvantage, the recipient [of federal funds] should always determine whether a firm is a small business concern. If it is not, then the firm is not eligible to be considered a disadvantaged business, and no further determinations need be made." 49 C.F.R. Pt. 23, Subpt. D, App. C. Thus, if petitioner were to apply for DBE certification, its application would be rejected without consideration of the race or gender of its owners.

[6] Neither the *Adarand* Court nor the D.C. Circuit in *Dynalantic* explicitly based its disposition of the standing issue on the fact that the plaintiffs in those cases were "small" businesses. Because both Adarand and Dynalantic *were* small businesses, however, neither the government (in its briefs) nor the reviewing courts were called upon to address the question whether a plaintiff that

Chapter of the Associated General Contractors of America v. *City of Jacksonville*, 508 U.S. 656 (1993), the plaintiff contractor association challenged a municipal ordinance setting aside for "Minority Business Enterprises" 10% of the amount spent on city contracts. *Id.* at 658. Nothing in the Court's opinion suggests that the association's members were ineligible to bid on the relevant contracts on any ground other than race; to the contrary, the Court assumed the truth of petitioner's allegation "that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able." *Id.* at 668. And in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), the defendant university conceded its inability to prove that the plaintiff would not have been admitted to the school even if racial factors had not been considered. See *id.* at 408-410 (opinion of Stevens, J.).

Petitioner cites no case holding that a person who is independently ineligible for a particular public benefit may sue to challenge purported discrimination in the criteria by which the benefit is awarded.[7] Thus, peti-

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did not satisfy the size limitation for DBEs would have standing to challenge the use of race- and gender-based presumptions in the DBE certification process.

[7] This Court has held that a plaintiff who alleges unlawful discrimination in the process by which public benefits are awarded need not allege in his complaint, or prove at trial, that he would have received the benefit if not for the purported discrimination. See, *e.g.*, *Northeastern Florida*, 508 U.S. at 666. The Court has not suggested, however, that such a suit may properly be brought by a plaintiff who is demonstrably ineligible for the benefit on independent, unchallenged grounds. For example, if a high school diploma is an absolute prerequisite to entrance into a particular college, an individual who is not a high school graduate surely could not sue to challenge the college's race-conscious admissions

tioner's inability to meet the applicable size limitation precludes adjudication of its challenge to the use of race- and gender-based presumptions in the DBE certification process.

3. Petitioner also contends that invalidation of the challenged race- and gender-based presumptions would lead to the elimination of the DBE program, or at least to a significant reduction in its scope, increasing petitioner's competitive opportunities and thereby redressing its injury. That argument provides no basis for finding that petitioner has standing to bring this suit. Insofar as petitioner contends that the challenged presumptions are not severable from the remainder of the statutory scheme, its claim is wrong as a matter of law. Insofar as petitioner argues that invalidation of the presumptions would substantially reduce the number of DBEs certified by the UDOT, the court of appeals correctly held that petitioner failed to present any evidence to substantiate its claim.

a. "A court should refrain from invalidating more of the statute than is necessary. Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (brackets, ellipsis, and internal quotation marks omitted). Thus, "[u]nless it is evident that the Legislature would not have enacted those provisions

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policies simply by asserting a right to have his application considered (and rejected) on the basis of nondiscriminatory criteria. To permit such suits to go forward would subvert the purposes of the "case or controversy" requirement by "convert[ing] the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Valley Forge*, 454 U.S. at 473 (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)).

which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Ibid.* (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam)). The absence of an explicit severability clause in the statute does not create a presumption against severability. *Alaska Airlines*, 480 U.S. at 686.

The court of appeals correctly held (Pet. App. 9-11) that if ISTEA's race-and gender-based presumptions were ultimately found to be invalid, those presumptions could appropriately be severed from the remainder of the statute, leaving in place the preference for "socially and economically disadvantaged" small businesses. Compare *INS* v. *Chadha*, 462 U.S. 919, 931-935 (1983) (recognizing that severability of challenged statutory provision may be relevant in determining whether a favorable judicial ruling would redress the plaintiff's injury). The Small Business Act states that it is the "policy of the United States that small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. 637(d)(1) (Supp. II 1996). The Act contains race-neutral definitions of the terms "[s]ocially disadvantaged individuals" and "[e]conomically disadvantaged individuals." 15 U.S.C. 637(a)(5) and (a)(6)(A) (quoted in note 2, *supra*). Section 1003(b) of ISTEA provided that "not less than 10 percent of the amounts authorized to be appropriated under [other provisions of the Act] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 105 Stat. 1919.

Although Congress determined that the statutory goals could best be achieved by treating women and members of specified racial and ethnic groups as presumptively disadvantaged (see p. 4, *supra*), petitioner offers no basis for concluding that Congress would have abandoned the effort to assist small businesses owned and operated by disadvantaged individuals if it had believed those presumptions to be impermissible. The justification for the challenged race- and gender-based presumptions is simply that membership in the specified groups was thought to bear a significant correlation to social disadvantage. See H.R. Conf. Rep. No. 1714, 95th Cong., 2d Sess. 21 (1978) ("in many * * * cases status as a minority can be directly and unequivocally correlated with social disadvantagement"). The statutory preference for socially and economically disadvantaged small-business owners would be fully capable of "functioning independently," *Alaska Airlines*, 480 U.S. at 684, however, even if that correlation were determined to be a constitutionally insufficient justification for the challenged presumptions. As the court of appeals recognized, the text and history of the pertinent statutory provisions indicate "that the legislative intent to foster development in small businesses whose owners have had to overcome social and economic hardship would remain even in the absence of the challenged presumption." Pet. App. 10. Since a DBE program without presumptions clearly would foster economic development in small businesses owned by minorities and women, as well as in firms owned by other "socially and economically disadvantaged" persons, the court of appeals correctly concluded that the presumptions are severable.

Petitioner's claim (see Pet. 9-13) of a conflict in authority on this point is unpersuasive. None of the

cases cited by petitioner holds that the challenged race- and gender-based presumptions are inseverable from the remainder of the statutory scheme.[8] Rather, petitioner relies on decisions recognizing that the remediation of past racial discrimination is a central objective of the DBE program. That proposition is beyond dispute. But those cases do not establish that Congress had no other objective, as it clearly did, in view of the fact that under the pertinent statutory and regulatory provisions, an individual may demonstrate that he is "socially and economically disadvantaged" even if he is not a member of one of the groups identified as presumptively disadvantaged. See pp. 5-6, *supra*. Nor do petitioner's cases establish that Congress would have abandoned its effort to remedy past race discrimination if the challenged presumptions were eliminated, and there is no reason to think that it would, in view of the fact that many individuals certified as "socially and economically disadvantaged" on the basis of the challenged presumptions could alternatively establish disadvantage based on an individualized inquiry if the presumptions were eliminated. There is consequently no conflict between the proposition that the DBE program serves in part to remedy past racial discrimina-

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[8] Petitioner's reliance (see Pet. 24-25) on the D.C. Circuit's decision in *Dynalantic* is misplaced. The *Dynalantic* court stated in passing that it could not "assume," at the pleading stage of the litigation, "that Congress would have enacted [Section 8(a) of the Small Business Act] without its race-conscious theme or that it would, if the statute were held unconstitutional, commit itself to a program of the same scale directed only to the economically disadvantaged without regard to race." 115 F.3d at 1017. The court did not purport to issue any holding, however, regarding the severability of any provision of the Small Business Act, and it did not address ISTEA at all.

tion, and the court of appeals' conclusion in this case that Congress would likely wish to continue the DBE provisions in effect even in the absence of the challenged race- and gender-based presumptions.

b. Notwithstanding the severability of the challenged race- and gender-based presumptions from the remainder of the statutory scheme, the court of appeals acknowledged that petitioner might be able to establish standing in this case if it could show that "the practical effect of eliminating the presumption would be some meaningful reduction in the number of DBEs against which it would be forced to compete." Pet. App. 12. The court concluded, however, that petitioner had presented "no evidence that any other subcontractors against whom [petitioner] competes would lose their DBE status as a result of eliminating the presumption." *Id.* at 13.[9] Because petitioner had "made no showing that an improvement in its terms of competition for subsequent contracts would likely result from a substantive adjudication in its favor," the court held that petitioner had failed to demonstrate its standing to sue. *Ibid.* That holding is correct and raises no issue warranting this Court's review.[10]

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[9] In particular, the court of appeals noted the absence of record evidence as to whether the particular DBE against whom petitioner had previously competed (see p. 6, *supra*) would have been certified absent the challenged presumptions. See Pet. App. 12-13.

[10] Petitioner contends (Pet. 13 n.14) that the court of appeals' holding imposes "impenetrable barriers" to plaintiffs seeking to challenge the constitutionality of the DBE provisions. Petitioner did not raise any such argument in the court of appeals, however, despite the fact that the district court had rejected, as unduly speculative, petitioner's contention that invalidation of the challenged presumptions would have the practical effect of reducing the scope of the DBE program. See Pet. App. 23-26. In any event,

The nature and extent of a plaintiff's burden as to standing vary depending on the stage of litigation. See, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 167-168 (1997); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561-562 (1992). At the pleadings stage, the burden of alleging that injury is "fairly traceable" to the defendant's conduct and likely to be redressed by a favorable decision is "relatively modest." *Bennett*, 520 U.S. at 171. At that early stage, general allegations, including those relating to standing, are presumed to be both true and inclusive of the facts necessary to support a claim. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 118 S. Ct. 1003, 1017 (1998); *Bennett*, 520 U.S. at 168; *Defenders of Wildlife*, 504 U.S. at 561; *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990). In opposing a motion for summary judgment, however, a "plaintiff can no longer rest on such 'mere allegations.'" *Defenders of Wildlife*, 504 U.S. at 561. Rather, it "must 'set forth' by affidavit or other evidence 'specific facts,'" *Bennett*, 520 U.S. at 168 (quoting Fed. R. Civ. P. 56(e)), as to each of the three elements of standing.[11]

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petitioner is ill-positioned to contend that the court of appeals' ruling imposes exorbitant evidentiary requirements, since petitioner failed to submit *any* evidence concerning the likely practical effect of a favorable judicial ruling.

Insofar as petitioner disputes the court of appeals' characterization of the evidentiary record in this case, that factbound dispute presents no issue of general importance warranting this Court's review. Insofar as petitioner contends that it was not required to introduce evidence regarding the likely practical effects of a favorable ruling, its argument is wrong for the reasons stated below.

[11] The Court has also recognized that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Defenders of Wildlife*, 504 U.S. at 562

In light of petitioner's failure to introduce *any* evidence as to the likely consequences of a judicial order invalidating the challenged race- and gender-based presumptions, the court of appeals correctly upheld the district court's grant of summary judgment. See Pet. App. 12-13. Contrary to petitioner's contention (see Pet. 21-24, 25-26), the court's holding as to redressability does not conflict with that of the D.C. Circuit in *Dynalantic*.[12] The court in *Dynalantic* was reviewing the district court's decision to dismiss on the pleadings, see 115 F.3d at 1014, and it recognized its obligation to "[t]ak[e] Dynalantic's allegations at this stage in the litigation as true," *id.* at 1018. The court had no occa-

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(quoting *Allen*, 468 U.S. at 758; *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975)). "In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps the response of others as well." *Defenders of Wildlife*, 504 U.S. at 562. It then "becomes the burden of the plaintiff to adduce facts showing that those choices [of third parties] have been or will be made in such manner as to produce causation and permit redressability of injury." *Ibid.*

In the instant case, while petitioner competes for government construction contracts, it is not directly affected by the race- and gender-based presumptions used in certifying DBEs, since it is independently ineligible (based on its size) for inclusion in the DBE program. Petitioner's claim of redressability ultimately depends on predictions concerning the manner in which third parties not before the Court would likely act if the race- and gender-based presumptions were held to be invalid. This Court has shown a consistent reluctance to allow such predictions to serve as the predicate for standing in the absence of firm evidence establishing their accuracy. See, *e.g.*, *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 42-46.

[12] The other court of appeals' decisions cited at page 27 of the petition do not address standing.

sion to discuss the quantum of evidence concerning redressability that would be required to withstand a motion for summary judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1999

Supreme Court, U.S.
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No. 98-579

In The

Supreme Court of the United States

October Term, 1998

CACHE VALLEY ELECTRIC COMPANY,

Petitioner,

v.

STATE OF UTAH DEPARTMENT OF TRANSPORTATION; CHARLES K. "CHUCK" LARSON, its civil rights manager; UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO FEDERAL RESPONDENT'S BRIEF IN OPPOSITION

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ISSUES PRESENTED

1. Whether the racial preferences in STURAA (§ 106(c)), ISTEA (§ 1003(b)), and TEA-21 (§ 1101(b)) are severable from those provisions?

2. Whether the challenging subcontractor, in order to demonstrate redressability, must demonstrate that those who qualified as DBEs under the racial presumption would not have qualified in its absence; or whether the Tenth Circuit panel erred in presuming what it had severed on account of unconstitutionality, that is, that all persons in the presumptive racial categories had been subjected to discrimination on account of their race until proven otherwise by a challenger to that status?

3. Whether the challenging subcontractor must demonstrate that it is a "small business concern" to establish standing to challenge STURAA (§ 106(c)), ISTEA (§ 1003(b)), and TEA-21 (§ 1101(b)), or whether its inability to compete on an equal constitutional footing is its injury?

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INTRODUCTION

On November 25, 1998, the United States District Court for the Western District of Texas, San Antonio Division, issued an order denying a motion for a preliminary injunction in *Rothe Development Corporation v. The United States Department of Defense, et al.* (Civil Action No. SA-98-CV-1011-EP). Rothe, a Texas corporation, challenged the constitutionality of the federal race-based contracting program that caused the contract on which it had submitted the lowest bid to be awarded to a competitor entitled to the race-based preference.

Before ruling on the motion for preliminary injunction, the District Court addressed "whether Rothe has standing to bring this suit." In so doing, the Court noted "[t]he government argues that. . . . [e]ven if the presumption of social disadvantage for racial minorities were removed. . . . Rothe would not be eligible for the preference. . . . " Therefore, "[a]ccording to the government, Rothe lacks such standing." In making its argument, "the government" (Respondent here) drew the Court's attention to the holding of the United States Court of Appeals for the Tenth Circuit in *Cache Valley Elec. Co. v. State of Utah Department of Transportation*, 149 F.3d 1119 (10th Cir. 1998).

In *Rothe*, the District Court rejected the Tenth Circuit's holding in *Cache Valley* and instead adopted the holding of the District of Columbia Circuit in *Dynalantic Corp. v. Department of Defense*, 115 F.3d 1012 (D.C. Cir. 1997). The Court noted that "[t]he D.C. Circuit has rejected [the] reasoning" of the Tenth Circuit. Thus, less than two months after the filing of this Petition, a federal

district court recognized that, on the issues presented here, there exists a split in the circuits. In fact, according to the District Court, the holding of the Tenth Circuit in *Cache Valley* is in conflict with the holding of this Court in *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995).[1]

Just as importantly for the purposes of this Petition, the Federal Respondent recognizes that there is a split in the circuits, a split that Respondent seeks to exploit by asking the District Court in *Rothe* to adopt the holding of the Tenth Circuit in *Cache Valley*. It is readily apparent that Respondent will continue to urge upon the lower courts the holding adopted by the Tenth Circuit in *Cache Valley*, notwithstanding its true, direct, intolerable, and irreconcilable conflict with the holdings of this Court in *Adarand* and in *Northeastern Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656 (1993). For this reason alone this Court should grant the petition.[2] Moreover, as set forth below, Respondent has failed

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[1] "As the Supreme Court noted in *Adarand*, the claimed injury is not the loss of a contract, but the inability for a non-minority bidder to bid under a fair and constitutional scheme. This is sufficient to establish standing." *Rothe*, Slip Op. at 5.

[2] In response to a question posed by U.S. Senator John Ashcroft (R-Missouri) as to when Federal Respondent would adhere to the holding of the U.S. Supreme Court in *Adarand*, the General Counsel of the U.S. Department of Transportation responded, "I think, certainly, if the Supreme Court of the United States said that our specific program was unconstitutional, we would not continue it." *Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand*, Committee on the Judiciary, Subcommittee on the Constitution, Federalism, and Property Rights, Senate Hearing 105-477 (September 30, 1998), Serial No. J-105-53. This Petition presents

to raise a single sustainable argument as to why this Petition should not be granted.

I. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT.

A. THE CONFLICT BETWEEN THE FACTUAL HOLDINGS OF THE TWO CIRCUITS IS MANIFEST AND IRRECONCILABLE.

Respondent boldly asserts that the Tenth Circuit's "decision in this case is correct and does not conflict with any decision of this Court or of any other court of appeals." Federal Respondent's Brief, at p. 9. Nonetheless, Respondent addresses two factual holdings of the Tenth Circuit that place the Tenth Circuit in direct and intolerable conflict with the District of Columbia Circuit.

Although the Tenth Circuit held in *Cache Valley* that the legislative history of the federal race-based highway program challenged there supported the Court's view that the race-based presumption could be severed from the statute, the District of Columbia Circuit held just the opposite in *Dynalantic*. Contrary to the assertions of Respondent, the *Dynalantic* Court's holding was no mere "passing" reference, but a thoughtful review of the statutory program at issue.[3] Held the Court, "We think the

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an opportunity to resolve the questions Respondent appears to have regarding this Court's earlier holdings on this subject.

[3] Notwithstanding Respondent's aside as to what the *Dynalantic* Court "assume[d]," it is Respondent and the *Cache*

government's statutory analysis [that the federal statute is not race conscious] is rather dubious." *Dynalantic*, at p. 1017. And, although Respondent points out that the *Dynalantic* Court did not address ISTEA, Section 1003(b), 105 Stat. 1919, had the Court addressed TEA-21, Section 1110(b), Public Law 105-178, the successor to ISTEA, the factual basis for its holding would have been strengthened because Congress, in adopting TEA-21, specifically declined to adopt the race-neutral substitute offered by

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Valley court that engage in not one, but two, incredible assumptions. First, Respondent and the *Cache Valley* Court assume, notwithstanding all the race-remediation language from the legislative history of STURAA, Section 106(c), 101 Stat. 145, ISTEA, and TEA-21 that Congress, denied the race-based presumption, would have enacted yet another small business program. Second, Respondent and the *Cache Valley* court engage in the very presumption that they propose to sever due to its unconstitutionality, that is, that persons who are presumptively "disadvantaged" have suffered discrimination.

In addition to those flawed assumptions, Respondent and the *Cache Valley* Court place the burden on Petitioner to demonstrate that persons qualified under this very unconstitutional presumption are not disadvantaged through discrimination. Neither the Tenth Circuit nor Respondent may assume, in the absence of a strong basis in evidence, that discrimination exists merely as a result of membership in a group, nor may they impose on Petitioner the unconstitutional burden of proving to the contrary. It is little wonder that the District of Columbia Circuit rejected these assumptions, thus creating the direct and intolerable conflict that now exists between these circuits.

Senator McConnell.[4] The conflict between the circuits regarding the severability of the race-based presumption must be resolved by this Court.

Respondent points as well to the factual holding of the Tenth Circuit panel in *Cache Valley* that elimination of the race-based presumption would not benefit Petitioner. Yet this holding is in direct and irreconcilable conflict with the holding of the District of Columbia Circuit in *Dynalantic*, where the Court took judicial notice of the fact that "over 99% of the firms qualified as a result of race-based presumptions." *Id.* at p. 1017. The *Dynalantic* Court would not conclude, as did the *Cache Valley* Court, that those qualified under a racial presumption of discrimination for the group to which they belong were actually, and personally, victims of discrimination resulting in social and economic disadvantage without a strong basis in evidence for that finding. The *Dynalantic* Court correctly placed the burden on the government to demonstrate that any of those presumptively qualified as a DBE as result of group membership alone were personally the victims of discrimination because of that group membership, resulting in social and economic disadvantage.

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[4] 144 Cong. Rec. S1465-1467 (March 5, 1998). Respondent seeks to, but may not, have it both ways. Respondent may not, in an attempt to meet the "strict scrutiny" test, assert that compelling governmental interest is shown by the lengthy legislative record in support of the race-based program and then, in an attempt to deny a litigant standing by severing the race-based provision, assert that Congress was not seeking to engage in racial remediation.